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No. 90-1398

In The

Supreme Court of the United States

October Term, 1990

XEROX CORPORATION, A NEW YORK CORPORATION,
Petitioner,

vs.

PETER N. TOLLIVER, LEONE A. WIATER, HELEN A. FORDHAM, DONALD SCHAEFER, WALTER L. PIDEK, JAMES CARROLL, LAWRENCE L. TRAVIS, WILLIAM BRANT, JAMES DAMMEN, CHARLES DOLCIMASCOLO, JOHN L. BENNETT, JOSEPH G. GOLOSSI, HAROLD SEIBERT, ALFRED E. RIZZARI, ALFONSE OLIVERI, PAUL J. MITTAK, RICHARD B. VAN MAAREN, and PAUL F. BRAUN,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

THEODORE S. KANTOR, ESQ.
Counsel of Record for Respondent, Paul F. Braun
175 Dartmouth Street
Rochester, New York 14607
Telephone: (716) 244-5752

DONNA MARIANETTI, ESQ.
Counsel of Record for Respondents, Peter N. Tolliver, et al.
525 Times Square Building
45 Exchange Street
Rochester, New York 14614
Telephone: (716) 232-5890

Daily Record Corporation
Rochester, New York

(17352)

QUESTIONS PRESENTED

1. Whether the central purposes of the Age Discrimination in Employment Act ("ADEA") administrative charge filing requirement with the Equal Employment Opportunity Commission (EEOC) have been met, as found by the Second Circuit Court of Appeals? That is, has there been sufficient notice to both the employer and the EEOC of the subject age discrimination complaints as well as an opportunity to investigate and conciliate these complaints?

2. Whether the decision of the Second Circuit Court of Appeals is consistent with the statutory interpretation of the EEOC, the Federal agency charged with its implementation, as well as consistent with other circuit courts of appeals which have decided issues similar to the present case?

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NATURE OF CASE

This is a brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, which Court in a written decision reversed and remanded to the United States District Court for the Western District of New York the 18 individual complaints of the named respondents herein who have pleaded actions against the petitioner alleging intentional and unlawful age discrimination in employment resulting in their termination as employees.

The United States Court of Appeals for the Second Circuit also denied petitioner's request for a rehearing of its decision and judgment and for a rehearing *en banc*. Accordingly, the present posture of this case, notwithstanding the instant petition for a Writ of Certiorari, is that the 18 named plaintiffs in their individual actions may proceed to be heard on the merits in the United States District Court for the Western District of New York on their complaints alleging unlawful age discrimination in employment against the defendant, Xerox Corporation.

Respondents herein respectfully request the denial of the petition for a Writ of Certiorari and that the matter be allowed to proceed on the merits in the trial court.

STATEMENT OF FACTS

The instant 18 named individual plaintiffs (respondents herein) allege certain facts in common. Among them are that they all were employed by the defendant Xerox Corporation and were wrongfully terminated from employment by reason of unlawful discrimination on the basis of age. All of the plaintiffs worked for Xerox in the Rochester, New York area. Each was terminated during an approximate two year period from November, 1981 to July, 1983. All of the plaintiffs were terminated from their employment with Xerox by reason of certain so-called "Re-

ductions in Force" ("RIFs"), some of which were alleged to be voluntary and others which were alleged to be involuntary. All of the plaintiffs fall within the protected class of workers between the ages of 40 through 70 years of age.

Additionally, all of the named plaintiffs herein affirmatively opted into the formerly conditionally certified class action which included some 1,312 former Xerox employees, when extant, which action was pending in the District Court of New Jersey alleging unlawful age discrimination in employment against Xerox. Said action was captioned *Lusardi v. Xerox Corporation*. Upon information and belief, certain aspects of that pending action which had been narrowed down to 13 named original plaintiffs may have been settled in a confidential settlement agreement, the terms of which are unknown to respondents. However, it has been reported that certain class action issues may remain unresolved. Nonetheless, following decertification of the aforesaid "Lusardi" class action, the 18 named plaintiffs herein who were not and are not parties to that settlement agreement and prior to any settlement which may have occurred, commenced their own individual actions in the United States District Court for the Western District of New York.

All of the named plaintiffs herein had alleged that they were members of the broadly defined class action grievance which had been extant in the "Lusardi" litigation, that is:

> "All salaried employees in the forty (40) - seventy (70) age group who in the period May 1, 1980 through March 31, 1983 have been terminated or required to retire from employment at an age less than seventy or have been denied equal employment opportunity for promotion in any unit, division or American subsidiary of Xerox Corporation and who contend that such termination, retirement or denial of promotion was caused by age discrimination policies or practices of Xerox Corporation.

See *Lusardi v. Xerox Corp.*, 747 F. 2d 174, 175 n. 1 (3d Cir. 1984) (A-5).*

As a result of various motions made by Xerox Corporation in the "Lusardi" litigation the class action was decertified. Included among the litigation involving the decertification issue was a mandamus proceeding captioned *Lusardi v. Leehner*, 855 F. 2d 1062 (3d Cir. 1988), which specifically held that the District Court's decertification determination should not consider as an issue pertinent thereto whether each opt-in plaintiff filed a timely charge with the EEOC. *Lusardi v. Lechner, supra*, at 1077-1080. Thus, the Third Circuit Court of Appeals specifically directed the District Court Judge to make its decision pertaining to the issue of class action certification or decertification without reliance on the timeliness of individual claimant's filings with the EEOC. The basis for said direction was that the original filing with the EEOC by the original "Lusardi" claimants had been timely, proper, and sufficiently stated a class action complaint such as to put Xerox and the EEOC on notice of the broad nature of the age discrimination grievance.

Following decertification of the class action in "Lusardi," these 18 former opt-in plaintiffs commenced their own timely individual complaints in the United States District Court for the Western District of New York. Following service of the instant actions upon Xerox, the defendants moved in the District Court for the Western District of New York for summary judgment and dismissal of these 18 individual complaints, *et uno*. The defendant (petitioner herein) sought dismissal on the grounds that these individual plaintiffs had not timely filed individual grievances with the EEOC so as to permit them to commence their respective actions alleging age discrimination in employment. This argu-

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*References to appendix pages are to appendix of petitioner's application for a Writ of Certiorari.

ment was made by petitioner notwithstanding that these plaintiffs were alleging that the acts of individual age discrimination which were being complained of by each of these plaintiffs were the same identical acts of discrimination previously alleged in the class action, occurred during the same alleged period of time and were as a result of the same alleged policies and practices which these same individuals had previously been complaining of in the then extant "Lusardi" class action. The District Court for the Western District of New York agreed with Xerox Corporation and dismissed all of these individual complaints principally on the grounds that the individual plaintiffs involved herein did not timely file an individual administrative charge with the EEOC following their termination from employment from Xerox Corporation. The District Court held that the individual plaintiffs herein could not "piggyback" on the previously filed class action age discrimination administrative charge filed by the original "Lusardi" plaintiffs for purposes of meeting the charge filing requirements of the Age Discrimination in Employment Act Section 7(d), 29 U.S.C. Section 626 (d) (2) (1988) ("ADEA"). The District Court thus dismissed each of the 18 individual actions presently involved in this proceeding.

All of the individual plaintiffs involved herein appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit Court of Appeals consolidated the 18 individual appeals for procedural purposes and reversed the District Court's decision and findings relative to the age discrimination issues. The Court found that the District Court erred in dismissing these complaints alleging age discrimination and remanded the matters back to the trial court for further proceedings on the merits.

The Second Circuit Court of Appeals essentially agreed with the individual plaintiffs herein and the position of the EEOC, which had filed an Amicus Curiae brief in support of the individual plaintiffs and participated in the oral argument on the ap-

peal. The EEOC's interpretation of the ADEA charge filing requirements does not require that each individual must file his own charge with the EEOC before he can bring an ADEA action, but only that *"a charge* alleging unlawful discrimination has been filed." 29 U.S.C. Section 626 (d) (1988) (A-67) (emphasis added). See also, opinion of Second Circuit reprinted at page A-8 with emphasis in original opinion. The Second Circuit Court of Appeals, the EEOC, and the 18 individual named plaintiffs herein, and the American Association of Retired Persons ("AARP"), who also filed an *Amicus Curiae* brief in support of these respondents in the Second Circuit Court of Appeals, *inter alia*, agreed that the administrative charge filing requirement of the law was met in this case and that it was improvident and incorrect to dismiss these complaints. It is submitted that the ruling and analysis of the Second Circuit Court of Appeals is correct and that a Writ of Certiorari is unwarranted in the present circumstances.

REASONS FOR NOT GRANTING THE WRIT

POINT I

THE CENTRAL PURPOSE OF THE CHARGE FILING REQUIREMENT WITH THE EEOC HAS BEEN MET, I.E. THERE HAS BEEN SUFFICIENT NOTICE TO BOTH THE EMPLOYER AND THE EEOC OF THE CLASS-WIDE AGE DISCRIMINATION COMPLAINTS AS WELL AS AN OPPORTUNITY TO INVESTIGATE AND CONCILIATE THE COMPLAINTS WHICH WERE MADE.

It appears from a reading of the petitioner's arguments under its first point in the underlying petition seeking a Writ of Certiorari that petitioner agrees with the central purposes of the ADEA administrative charge filing requirements with the EEOC. That

is, to put the EEOC and the employer on notice of the complaint, to permit an investigation thereof, and to attempt conciliation and voluntary compliance alleviating the necessity of resort to litigation to resolve the dispute. 29 U.S.C. Section 626 (d) (1988). There can be no doubt that this is consistent with the law, the opinion of the Second Circuit and the interpretation of the EEOC. See opinion of Second Circuit below, wherein it is stated,

> The question is whether the timely filed claims provided an adequate opportunity to satisfy the statutory tasks imposed upon the EEOC. Central to those tasks is an attempt to conciliate the grievances. (A-14).

Where the instant plaintiffs differ with petitioner and where petitioner differs with the law as applied and interpreted by the EEOC and as determined by the Second Circuit is with petitioner's argument that the instant class action wide administrative charge which *was* filed in this case by the original "Lusardi" plaintiffs was insufficient to put Xerox on notice of the nature of the complaint and/or deprived Xerox of an opportunity to resolve the grievance through the informal means of conciliation, conference and persuasion. (emphasis added).

As recognized by the Second Circuit when the "Lusardi" named plaintiffs filed their charges, both the EEOC and Xerox were aware of the charges of unlawful age discrimination being brought by former employees concerning Xerox's "RIFs" during the years 1981 through 1983, as implemented by Xerox involving persons aged 40 to 70. The original administrative charge filed by the "Lusardi" plaintiffs did not purport to complain of a single isolated act of alleged age discrimination. Rather, it was a broad based charge of age discrimination covering a period of approximately two years and involving a group of former employees over the age of forty (40) expressly alleging an unlawful pattern of discrimination by Xerox against persons as a class, particu-

larly with respect to the implementation of reductions in the work force.

There can be no doubt that such a charge put Xerox on notice that they were dealing with more than an isolated act of discrimination by a single individual. Xerox chose to respond to the class action age discrimination grievance filed in the EEOC by denying its validity and forcing litigation. Conciliation efforts in the EEOC failed. Xerox should not now be heard to argue that the law requires individual filings by each and every potential plaintiff who was in that putative class for at least two reasons: (1) Xerox had specific notice of who these individuals were, by name, by reason of the opt-in requirement of 29 U.S.C. Section 216 (b) (1988) (A-69, A-70) and did not avail themselves of the opportunity to conciliate the grievances with these individuals either when the class action administrative filing was initially made in the EEOC, nor (2) did Xerox avail itself of the opportunity to conciliate with them when the class action litigation was still extant and the exact number and names of such persons were known to Xerox.

Xerox's refusal to enter into proper conciliation agreements with these named plaintiffs as well as Xerox's refusal to litigate their claims on the merits demonstrates that the strategy of Xerox is to delay, stall, confuse and procedurally obfuscate legitimate claims in an attempt to simply wear down enough people to reduce their potential liability. Such a tact has nothing to do with the congressional purposes which support the Age Discrimination in Employment Act.

The arguments which Xerox is making in this proceeding have no merit. They are contradictory with Xerox's own positions in prior litigation concerning these identical plaintiffs. In addition, they fly in the face of established law in similar Title VII actions in other circuit court opinions in this and in other contexts. Petitioner's arguments are also contrary to the sound administrative

policy and interpretation of the Federal agency charged with the duty to implement congressional intent in this area, i.e., the Equal Employment Opportunity Commission ("EEOC").

Xerox's arguments have been rejected by the circuit courts in the context of Title VII claims and as has been pointed out by Judge (later Attorney General) Griffin Bell in *Oatis v. Crown Zellerbach Corp.*, 398 F. 2d 496, 498 (5th Cir. 1968):

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume that the next one would be successful.

See also, *Bowe v. Colgate Palmolive Co.*, 426 F. 2d 711, 719-721 (7th Cir. 1969).

It is submitted that petitioner advances no substantial public policy reason or practical concern for requiring multiple, virtually identical charges by each and every individual plaintiff in this case. As the employer, Xerox had knowledge of the class wide nature of the complaint in a timely fashion both in the EEOC and in the prior class action litigation. In fact, as a result of the affirmative opt-in requirements of the law (29 U.S.C. Section 216 (b) (1988)), Xerox had knowledge of the names and circumstances of each and every named plaintiff involved herein while the class action litigation was still extant. In several cases this knowledge of Xerox has been in their possession for in excess of seven (7) years. (Braun's opt-in occurred in March 1984, for example). Thus these claims were not stale when made. It is respectfully submitted that the only thing that is getting stale is the refusal of Xerox to face the reality of its own protracted litigation tactics and to do what it should have done many years ago, that is to resolve fairly and peaceably these justified grievances of its former employees.

Accordingly, it is submitted that the central purposes of the ADEA charge filing requirements of notice and opportunity to conciliate have been met by the statutory interpretation espoused by the EEOC and adopted by the Second Circuit Court of Appeals. Thus, the petition for a Writ of Certiorari sought herein should be denied.

POINT II

THE DECISION OF THE SECOND CIRCUIT DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS AND IN FACT REDUCES UNNECESSARY PROLIFERATION OF LITIGATION.

It should be pointed out to this Court that the contention of petitioner, Xerox Corp., that the decision of the Second Circuit creates an "apparent conflict among the circuits" is without merit. It is important for this Court to realize that the determination which was made by the Second Circuit in this case was, in reality, a determination of an issue of first impression. To the knowledge of the plaintiffs, *amici*, and the Circuit Court, no prior case has been found which concerns the principal issue which the Second Circuit was confronted with. That is, whether a prior proper and timely filing of an EEOC age discrimination charge alleging class wide age discrimination in employment is sufficient to permit former class action opt-in plaintiffs who had previously been a part of the class action litigation, when certified, to commence their own individual actions in court, after decertification, without the necessity of re-filing or filing new administrative charges for each former opt-in plaintiff who seeks redress in his own individual action as long as the original charge was timely as to him.

That such an issue is one of first impression is basically conceded by petitioner itself at page 57 of its Petition herein, wherein

it is stated, "...the Second Circuit is the first circuit court which has specifically addressed this issue...."

Petitioner would argue that notwithstanding that this is an issue of first impression it is nevertheless in conflict with other circuits because other circuits dealing with single filing rules under the ADEA have previously only been concerned with their effect on opt-in plaintiffs in ongoing class action litigation. None, however, have been concerned with the circumstances of this case, i.e., involving a decertified class action and former opt-in plaintiffs seeking to commence their own individual actions following decertification of the class action. Cf. *Lockhart v. Westinghouse Credit Corp.*, 879 F. 2d 43 (3rd Cir. 1989); *Anderson v. Montgomery Ward & Co., Inc.*, 852 F. 2d 1008 (7th Cir. 1988); *Kloos v. Carter-Day Co.*, 799 F. 2d 397 (8th Cir. 1986); *Mistretta v. Sandia Corp.*, 639 F. 2d 588 (10th Cir. 1980); *Bean v. Crocker Nat'l Bank*, 600 F. 2d 754 (9th Cir. 1979); *Oatis v. Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968).

Not only have the other circuits, in contra-distinction to the point petitioner is contending, upheld the single filing rules in the context of piggybacking into ongoing class actions, but as pointed out by the Second Circuit herein have permitted such single filing rules to allow aggrieved plaintiffs to join in individual's lawsuits who have filed timely administrative charges provided the claims " 'aris[e] out of similar discriminatory treatment in the same time frame.' " *Snell v. Suffolk County*, 782 F. 2d 1094, 1100 (2d Cir. 1986) (quoting *Ezell v. Mobil Housing Board*, 709 F. 2d 1376, 1381 (11th Cir. 1983) (and citing *De Medina v. Reinhardt*, 686 F. 2d 997, 1012-13 (D.C. Cir. 1982); *Crawford v. United States Steel Corp.*, 660 F. 2d 663, 665-66 (5th Cir. 1981); *Allen v. Amalgamated Transit Union Local 788*, 554 F. 2d 876, 882-83 (8th Cir.), cert. denied, 434 U.S. 891 (1977) (A-8, A-9).

Thus, the Second Circuit's analysis and application of the single filing rule to the instant plaintiffs is not only consistent with

the analysis and application of the rule in the circumstances which have pre-dated it, but is also consistent with the analysis and application of the rule in Title VII actions where it has been similarly applied. See e.g. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982).

With regard to the contention of petitioner that the Second Circuit's application of the single filing rule will result in a proliferation of unnecessary litigation, it is submitted that the contention is without merit and in fact that the exact opposite is true. The use of a single filing rule will on its face in an appropriate case such as the present one, reduce the number of administrative filings with the EEOC by potentially thousands of unnecessary filings. This is not only common sense, but it is also the interpretation of the EEOC itself which, as found by the Second Circuit, is entitled to the same deference accorded to its interpretation of analogous Title VII provisions. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979). (A-10). The EEOC has interpreted the ADEA filing requirements to be satisfied "so long as the matter complained of was within the scope of [a] previously filed charge, *regardless of who filed it.*" (emphasis added). 43 Fed. Reg. 138, 139 (1983) (A-10).

No purpose can be served by requiring individual plaintiffs whose name and complaint are already known to the employer by reason of their formerly having filed an opt-in document in a previously pending conditionally certified class action to have to file another complaint with the EEOC in order to commence their own individual action in court following decertification. To require such, as Xerox would want, would obviously require the proliferation of unnecessary and repetitive filings where none such is warranted. Such an argument has been rejected by the EEOC as an unnecessary burden upon them and has been rejected by the Courts in Title VII situations. See e.g. *Oatis v.*

Crown Zellerbach Corp., supra, 398 F. 2d 496, at 498 (5th Cir. 1968). It has now also properly been rejected by the Second Circuit in the context of this case, under the ADEA (A-10).

One final point should be noted in this context. That is, that petitioner's arguments suggesting (1) a conflict among circuits where none exists, and (2) a proliferation of litigation where, in reality, only a reduction in litigation would occur, suggests the disingenuity of petitioner's position throughout this litigation. It must be remembered that it is as a result of petitioner's motion that the class action litigation in *Lusardi v. Xerox Corporation, supra*, was decertified. Petitioner could have chosen to defend that action on the merits or to conciliate it while it was in the class wide posture. However, petitioner chose to defend their action by seeking decertification of the class which it achieved.

At page 61 of the petition, Xerox argues that the claims of non-filing plaintiffs "should only be litigated, if at all, together." It is totally inconsistent that Xerox can be heard to make this argument because the reason these individual plaintiffs are before this court at all in their individual capacities, is because their attempt to litigate their claims against Xerox "together," that is, in an opt-in class action, was defeated by Xerox in its motion for decertification of the class. Xerox seeks to ignore the posture of its prior motions that these plaintiffs were not sufficiently "similarly situated" to maintain a class action and now attempts to argue at page 61 that they "are similarly situated but have not filed timely charges." It is respectfully submitted that Xerox should not be permitted to have it both ways.

There is no question that while these individual plaintiffs were members of the putative class action that the single administrative filing in *Lusardi, supra* was sufficient. See e.g. *Lusardi v. Lechner, supra; Kloos v. Carter-Day Co., supra; Anderson v. Montgomery Ward & Co., supra et al.* Thus, the result of petitioner's own strategy, not the law, nor the Second Circuit's opin-

ion, has occasioned these additional individual lawsuits. Now for petitioner to suggest that a single filing rule will result in a proliferation of litigation is to try to blind the Court to the reality of the circumstances. That is, that the present litigation results from the discrimination practices and policies of the petitioner together with the litigation strategy it has adopted and not from the opinion of the Second Circuit, the interpretation of the EEOC, nor the actions of these individual plaintiffs. Plaintiffs are seeking to resolve these complaints expeditiously and on the merits rather than piecemeal and through the process of petitioner's arcane and procedurally obfuscating tactics.

Since the single filing rule adequately apprised Xerox and the EEOC of both the nature and breadth of the age discrimination complaints as well as provided Xerox with an adequate opportunity to conciliate the class action claims when extant had they availed themselves of it, such a rule must surely be considered to be adequate following decertification of the class after Xerox already has had an opportunity to conduct extensive discovery of known plaintiffs. In fact, this is information which it would not have had the class action administrative charge not been made and these individual plaintiffs not previously affirmatively opted into the "Lusardi" class action many years ago. There is clearly no prejudice to Xerox by the adoption of the single filing rule which is the subject of this petition for a Writ of Certiorari in the circumstances of this case. It is submitted that common sense, the practical interpretation advanced by the EEOC, as well as the sound public policy reasons adopted by the Second Circuit Court of Appeals dictate that the result reached in the court below was correct.

Accordingly, it is submitted that there is no merit to the petition for a Writ of Certiorari and petitioner's application should be denied.

The arguments of the Equal Employment Advisory Council ("EEAC") in their proposed *Amicus Curiae* Brief and motion relative to the petition for Writ of Certiorari are also misplaced.

The "single-filing rule" of the Second Circuit Court of Appeals clearly took into consideration the fact that timely class action administrative charges were filed with the EEOC by the "Lusardi" plaintiffs in this case. It cannot be over-emphasized to this court that contrary to the position of the petitioner and the EEAC, these individual plaintiffs all timely opted into the then extant and conditionally certified class action. Thus, for two important reasons, EEAC's and petitioner's arguments are misplaced, as follows: 1) the initial class action administrative charge of the "Lusardi" plaintiffs gave notice to the employer and to the EEOC that more than one isolated act of employment discrimination by reason of age was alleged. The initial charge alleged broad based, class wide, age discrimination covering a period of approximately two years and involving more than one department or division of Xerox. Thus, had Xerox chosen to conciliate this charge, rather than defend on the basis that no such discrimination occurred, it could have done so on a class basis based upon the notice it received from the "Lusardi" administrative charge; and 2) the 18 individual plaintiffs herein were all part of the "Lusardi" class action litigation having affirmatively opted into that conditionally certified class action in a timely and proper manner. Thus, had Xerox chosen to conciliate with these persons on an individual basis, also in keeping with the central purposes of the ADEA charge filing statutory requirements it could have done so when the class action was still extant and in some cases more than seven (7) years ago. Thùs, neither Xerox nor the EEAC should be heard to argue that these claims are stale. They were not stale when filed by "Lusardi" on a class action basis and were not stale when individually opted into by these plaintiffs in the "Lusardi" litigation. EEAC's strawman arguments that an individual could wait fifteen (15) or twenty (20)

years to file an age discrimination claim after "a timely charge was filed, even if the charge was not filed in connection with these ADEA actions," (EEAC *Amicus* Brief, at page 13) ignores the reasoning and analysis of the Second Circuit, the clear requirements of notice having been met in the context of this case, and the statutes of limitation, where applicable, which would prevent truly stale claims from being asserted in this context. These claims are not stale and were not stale when made. The Second Circuit's opinion and reasoning should be allowed to stand and the petition for a Writ of Certiorari denied.

CONCLUSION

The petition seeking a Writ of Certiorari should be denied.

Dated: April 5, 1991

THEODORE S. KANTOR, ESQ.
Attorney of Plaintiff-Respondent, Paul F. Braun
175 Dartmouth Street
Rochester, New York 14607
Telephone: (716) 244-5752

DONNA MARIANETTI, ESQ.
Attorney for Plaintiffs-Respondents, Peter N. Tolliver, et al.
525 Times Square Building
45 Exchange Street
Rochester, New York 14614
Telephone: (716) 232-5890